Multimedia Development Corp Sdn Bhd v Pembinaan Purcon Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4–24–3 OF 2004
ABDUL MALIK ISHAK J
1 JANUARY 2006

Civil Procedure — Action — Duplicity of actions — Whether suits were duplication of each other

Civil Procedure — Injunction — Injunction to restrain presentation of winding up petition — Whether American Cyanamid test applicable

Civil Procedure — Injunction — Injunction to restrain winding up petition — Petition to exert pressure to settle judgment sum — Whether petition was an abuse of process of the court — Whether injunction should be granted

Civil Procedure — Irregularity — Waiver — Error in intitulement — Intitulement not misleading or prejudicial or caused embarrassment to defendant — Defendant taken steps to proceedings — Whether deemed to have waived preliminary objection on intitulement

Companies and Corporations — Winding up — Petition under s 218 — Bona fide dispute on debt — No attempt to request for payment of judgment sum — Use of petition to exert pressure on defendant to settle debt — Whether abuse of process of court

Companies and Corporations — Winding up — Petition under s 218 — Injunction to restrain winding up petition — Whether immediate right accrued to respondent to take necessary step to restrain presentation of intended winding up petition without need to wait for actual presentation of petition

The defendant ('Purcon') had obtained summary judgment against the plaintiff ('MDC') — through the Shah Alam High Court Civil Suit No 22–491 of 2003 ('the Shah Alam suit') — for payment of RM5,721,387.97 for work allegedly done by Purcon for Entertainment Village (M) Sdn Bhd ('EVSB'), a company related to MDC. Purcon had claimed that MDC had guaranteed to pay to Purcon the amount owing by EVSB. MDC had successfully obtained a stay of execution of the summary judgment. Subsequently, pursuant to the summary judgment, Purcon issued a statutory notice under s 218 of the Companies Act 1965 to MDC to demand the payment of a sum of the judgment sum that was said to be owing by MDC to Purcon under the summary judgment. MDC disputed the debt on substantial grounds.

In this suit, MDC sought for an injunction to restrain Purcon, its servants, agents or otherwise howsoever from presenting a petition for the winding up of MDC until the

final determination of Shah Alam suit. According to MDC, it was an abuse of the process of the court if Purcon was allowed to present a winding up petition against MDC.

Purcon raised three preliminary issues: (1) the plaintiff's originating summons in this suit was not necessary since it was an abuse of the process of the court and was now academic in nature; (2) the plaintiff's originating summons was defective since MDC's name as stated in the intitulement was not an entity; and (3) the plaintiff failed to disclose material facts that would adversely affect and negative the application for injunctive reliefs. It was argued that Purcon was entitled to commence winding up petition based on the judgment obtained in the Shah Alam High Court despite the fact that there was an appeal pending against the judgment. Purcon also argued that this suit by MDC was a duplication of the Shah Alam suit.

Held, allowing the plaintiff's application:

(1) Given that the notice issued by Purcon under s 218 was a pre-requisite to the commencement of the winding up proceeding, an immediate right accrued to MDC to take the necessary step to restrain the presentation of any intended winding up petition without the need to wait for the actual presentation of the petition by Purcon. The proposal by Purcon to withhold execution proceeding including the winding up proceeding and likewise the proposal from MDC to withdraw the suit did not neutralise the fact that a s 218 notice to present a winding up petition had been served on MDC by Purcon and the threat of an impending proceeding under the Companies Act 1965 had become the main factor in the current originating summons (see para 5).

(2) The intitulement was unlikely to mislead or cause any prejudice or embarrassment to Purcon. Purcon had taken a step in the proceedings and it must be deemed to have waived the preliminary objections on procedural non-compliance. Furthermore whatever non-compliance complained of by Purcon, it amounted, at best, to a breach of a procedural requirement. It was not of such a gravity as to warrant a sanction by this court by denying MDC the reliefs which it sought. There was no injustice occasioned to Purcon by reason of the procedural breach (see para 9).

(3) The cause of action as reflected in the originating summons in this case was grounded on the tort of an abuse of process. The objective and legal basis of the present suit before this court was certainly different from that of the Shah Alam suit although the two suits shared the same underlying facts. The Shah Alam suit was but a genesis to this current suit before this court and the substratum of this current suit was based on an event subsequent to the proceedings in the Shah Alam High Court. Consequently, there was no duplication as alleged by Purcon. In the two cases, the causes of action were different in nature and they sought for different remedies entirely (see para 13).

(4) It was certainly an abuse of the process of the court to petition MDC upon the basis of a debt which was bona fide disputed. Purcon was exerting undue pressure on MDC. The s 218 notice was based upon a judgment debt obtained by Purcon in a related Shah Alam suit where Purcon was the plaintiff. The

judgment was for an unsecured debt and MDC had filed an appeal to the judge in chambers and the appeal was still pending. Meantime MDC had applied and obtained a stay of execution of the judgment in the Shah Alam High Court. Now, the events leading up to the service of the s 218 notice clearly showed that Purcon was only interested to ulitise the proceedings of the Companies Court to exert undue pressure. This was quite evident as there was never any attempt by Purcon to request for the payment of the judgment sum (see para 23).

(5) The totality of the evidence as presented in this suit overwhelmingly showed that the predominant purpose of Purcon's intended winding up proceeding was none other than to force payment of its money judgment debt from MDC and not for the benefit of the general body of creditors of MDC as claimed. On the strength of its inherent jurisdiction, this court certainly had the power to grant an injunction to restrain Purcon from filing a winding up petition against MDC (see para 30).

(6) An injunction to restrain the presentation of a winding up petition is not the same as an application for an interlocutory injunction to restrain the defendant from doing acts alleged to be in violation of the plaintiff's legal right. It is, in fact, an injunction to restrain the defendant from exercising his legal right to present a petition. The dicta of Lord Diplock in the landmark case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 does not apply to such an application (see para 46); *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311 followed.

(7) If the sole or predominant purpose of the intended winding up is for a collateral purpose of exerting under pressure for a mere collection of debt or simply to bring pressure to bear or to force the company to negotiate with the creditor, the creditor would be abusing the process of the court for which an injunction would lie to prevent the creditor from exercising such right (see para 46); *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors* [1986] 1 CLJ 493 followed.

(8) The companies court must not be used as a debt collecting agency nor as a means to bring improper pressure to bear on a company. It would be wrong to allow such petitions to be used as a means of resolving disputes which ought to be settled in an ordinary litigation or to be kept in suspense over the company's head while the litigation is being fought out (see para 46); *Re Lympne Investments Ltd* [1972] 2 All ER 385 followed.

(9) The courts are generally reluctant and wary in allowing winding up petitions. Litigants should resort to a lesser drastic alternative remedy despite the fact that the grounds to support the petitions may be substantiated (see para 46).

[Bahasa Malaysia summary

Defendan ('Purcon') telah memperoleh penghakiman terus terhadap plaintif ('MDC') — melalui Guaman Sivil Mahkamah Sivil No 22–491 tahun 2003 ('guaman Shah Alam') — untuk bayaran RM5,721,387.97 untuk kerja yang telah dilaksanakan oleh Purcon untuk Entertainment Village (M) Sdn Bhd ('EVSB'),

sebuah syarikat berkaitan dengan MDC. Purcon telah mendakwa bahawa MDC telah memberi jaminan untuk membayar kepada Purcon jumlah yang perlu dibayar oleh EVSB. MDC telah berjaya memperoleh penggantungan pelaksanaan untuk penghakiman terus. Berikutan itu, menurut penghakiman terus, Purcon telah mengeluarkan satu notis statutori di bawah s 218 Akta Syarikat 1965 kepada MDC menuntut bayaran untuk jumlah penghakiman yang dikatakan perlu dibayar oleh MDC kepada Purcon di bawah penghakiman terus itu. MDC telah mempertikaikan hutang tersebut berdasarkan alasan substantif.

Dalam guaman ini, MDC memohon satu injunksi untuk menghalang Purcon, pekerja-pekerja, ejen-ejen atau sebaliknya daripada mengemukakan satu petisyen penggulungan MDC sehingga penentuan muktamada guaman Shah Alam. Menurut MDC, ia adalah satu penyalahgunaan proses mahkamah jika Purcon dibenarkan mengemukakan petisyen penggulungan terhadap MDC.

Purcon telah menimbulkan tiga persoalan awal: (1) saman pemula plaintif dalam guaman ini tidak diperlukan kerana ia adalah satu penyalahgunaan proses mahkamah dan kini bersifat akademik; (2) saman pemula plaintif adalah cacat kerana nama MDC sepertimana yang tertera pada tajuk itu bukan satu entiti; dan (3) plaintif telah gagal untuk mendedahkan fakta penting yang mempengaruhi secara negatif permohonan untuk relief injunksi. Adalah dihujahkan bahawa Purcon berhak untuk memulakan petisyen penggulungan berdasarkan penghakiman yang diperoleh di Mahkamah Tinggi Shah Alam meskipun hakikatnya terdapat satu rayuan yang belum selesai terhadap penghakiman itu. Purcon juga berhujah bahawa guaman ini oleh MDC merupakan duplikasi guaman Shah Alam.]

Diputuskan, membenarkna permohonan plaintif:

(1) Memandangkan notis yang dikeluarkan oleh Purcon di bawah s 218 adalah satu pra syarat untuk memulakan prosiding penggulungan, hak serta merta terakru kepada MDC untuk mengambil langkah perlu untuk menghalang pengeluaran apa-apa petisyen penggulungan yang diniatkan tanpa perlunya menanti pengeluaran sebenar petisyen oleh Purcon. Cadangan oleh Purcon untuk tidak melaksanakan prosiding termasuklah prosiding pengglungan dan juga cadangan daripada MDC untuk menarik balik guaman tersebut tidak meneutralkan fakta bahawa suatu notis s 218 untuk mengemukakan satu petisyen penggulungan telah disampaikan ke atas MDC oleh Purcon dan ugutan prosiding yang akan berlaku di bawah Akta SYarikat 1965 merupakan faktor utama dalam saman pemula semasa (lihat perenggan 5).

(2) Tajuk itu tidak mungkin menyebabkan kekeliruan atau apa-apa prejudis atau rasa malu kepada Purcon. Purcon telah mengambil langkah dalam prosiding dan ia dianggap telah mengenepikan bantahan awal atas prosedur ketidakpatuhan. Tambahan pula, apa-apa ketidakpatuhan yang diadukan ooleh Purcon, membentuk, lebih-lebihpun, satu perlanggaran satu keperluan prosedural. Ia tidaklah begitu mendesak untuk mewarankan satu sanksi oleh mahakmah ini dengan menafikan MDC relief yang ia pohon. Tiada ketidakadilan berlaku ke atas Purcon oleh sebab perlanggaran prosedural (lihat perenggan 9).

(3) Kausa tindakan seperti yang digambarkan dalam saman pemula dalam kes ini berdasarkan tort kerana penyalahgunaan proses. Objektif dan asas undang-undang guaman semasa di hadapan mahkamah ini amat berbeza dengan guaman Shah Alam meskipun kedua-dua guaman tersebut mempunyai fakta yang sama. Guaman Shah Alam tersebut adalah titik permulaan kepada guaman semasa ini di hadapan mahkamah ini dan asas guaman semasa ini adalah berdasarkan satu kejadian berikutan prosiding di Mahkamah Tinggi Shah Alam. Berikutan itu, tiada duplikasi seperti yang dikatkan oleh Purcon. Dalam dua kes tersebut, kausa-kausa tindakan adalah ebrbeza sifatnya dan memohon remedi yang berbeza (lihat perenggan 13).

(4) Sememangnya ia suatu penyalahgunaan proses mahkamah untuk mengemukakan petisyen kepada MDC berdasarkan hutang yang dipertikaikan secara niat baik. Purcon telah memberikan tekanan yang tidak berpatutan ke atas MDC. Notis s 218 adalah berdasarkan satu penghakiman hutang yang diperoleh oleh Purcon dalam satu guaman Shah Alam yang berkaitan di mana Purcon merupakan plaintif. Penghakiman itu adalah untuk hutang yang tidak dijamin dan MDC telah memfailkan satu rayuan kepada hakim dalam kamar dan rayuan tersebut masih belum selesai. Sementara itu MDC telah memohon dan memperoleh satu pelaksanaan penggantungan penghakiman di Mahkamah Tinggi Shah Alam. Sekarang, kejadian yang menimbulkan menyampaian notis s 218 dengan jelas menunjukkan bahawa Purcon hanya berminat untuk menggunakan prosiding Mahkamah Syarikat untuk mendesak tekanan yangtidak berpatutan. Ini adalah jelas kerana tiada apa-apa percubaan oleh Purcon untuk meminta bayaran untuk jumlah penghakiman itu (lihat perenggan 23).

(5) Keseluruhan keterangan yang dikemukakan dalam guaman ini dengan jelas menunjukkan tujuan utama prosiding penggulungan yang diniatkan oleh Purcon adalah hanya untuk mendesak bayaran wang penghakimannya daripada MDC dan bukan untuk manfaat badan pemiutang am MDc seperti yang didakwa. Berdasarkan bidang kuasa sedia adanya, mahkamah ini sememangnya mempunyai kuasa untuk membenarkan injunksi menghalang Purcon daripada memfailkan satu petisyen penggulungan terhadap MDC (lihat perenggan 30).

(6) Satu injunksi untuk menghalang pengeluaran petisyen penggulungan tidak sama seperti satu permohonan untuk satu injunksi interlokutori untuk menghalang defendan daripada melakukan perbuatan yang dikatakan mencabuli hak plaintif di sisi undang-undang. Ia sememangnya, satu injunksi untuk menghalang defendan daripada menggunakan haknya di sisi undang-undang untuk mengemukakan petisyen. Dicta Lord Diplock dalam kes *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 tidak terpakai untuk permohonan sebegini (lihat perenggan 46); *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311 diikut.

(7) Jika satu-satunya tujuan utama untuk penggulungan yang diniatkan adalah untuk satu tujuan kolateral mendesak dengan memberi tekanan untuk kutipan hutang atau memberi tekanan untuk memaksa syarikat berunding dengan pemiutang, pemiutang dianggap telah menyalahgunakan proses mahkamah yang mana suatu injunksi itu bertujuan untuk menghalang pemiutang

daripada menggunakan hak sedemikian (lihat perenggan 46); *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors* [1986] 1 CLJ 493 diikut.

(8) Mahkamah Syarikat tidak boleh digunakan sebagai ejensi pungutan hutang maupun sebagai sumber yang memberi tekanan yang tidak berpatutan ke atas suatu syarikat. Adalah salah untuk membenarkan petisyen sedemikian digunakan sebagai cara untuk menyelesaikan pertikaian yang sepatutnya diselesaikan dalam litigasi biasa atau menjadi tanda tanya syarikat tatkala litigasi berlangsung (lihat perenggan 46); *Re Lympne Investments Ltd* [1972] 2 All ER 385 diikut.

(9) Mahkamah pada amnya enggan dan berhati-hati untuk membenarkan petisyen penggulungan. Para litigan sepatutnya menggunakan remedi alternatif yang tidak drastik meskipun fakta bahawa alasan untuk menyokong petisyen boleh disahkan (lihat perenggan 46).

Notes

For a case on irregularity of waiver, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 3350.

For cases on duplicity of actions, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 122–123.

For cases on injunction to restrain presentation of winding up petition, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2733–2735.

For cases on injunction to restrain winding up petition, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2741–2745.

For cases on winding up of petitions under s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1229–1249.

Cases referred to

A Debtor, Re (No 20 of 1904), ex p Debtor (1904) 91 LT 664 (refd)

A Debtor, Re (No 757 of 1954), ex p Debtor v FA Dumont Ltd (Petitioning Creditor) [1955] 2 All ER 65 (refd)

A Debtor, Re (No 883 of 1927) (1928) Ch 199 (refd)

A Judgment Summons, Re (No 25 of 1952), ex p Henlys Ltd [1953] Ch 1; [1952] 2 All ER 772 (refd)

American Cyanamid Co v Ethicon Ltd [1975] AC 396, [1975] 1 All ER 504 (not folld)

Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors [1986] 1 CLJ 493 (folld)

Brindley, Re, ex p Taylor, Sons & Co [1906] 1 KB 377 (refd)

Bryanston Finance Ltd v De Vries (No 2), Same v Same (1976) 1 Ch 63 (refd)

Charles Forte Investments Ltd v Amanda [1964] 1 Ch 240 (refd)

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321

Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation [1976] 2 ACLR 349 (refd)

G, Re, ex p B (1900) 44 Sol Jo 345 (refd)

Goldberg, Re [1904] 21 LTR 139 (refd)

Great Britian Mutual Life Assurance Society, Re (1880) 16 Ch D 246

Hock Hua Bank v Leong Yew Chin [1987] 1 MLJ 230 (refd)

International Tin Council, In re [1988] 3 WLR 1159 (refd)

King's Cross Industrial Dwellings Co, Re (1870) 11 Eq 149 (refd)

Letang v Cooper [1965] 1 QB 232 (refd)
Lympne Investments Ltd, Re [1972] 2 All ER 385 (folld)
Majory, Re, A Debtor, ex p Debtor v FA Dumont Ltd [1955] Ch 600 (refd)
Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd [2003] 6 MLJ 311 (folld)
OIW Retailers Ltd v Felview Pty Ltd (1989) 7 ACLC 519 (refd)
Pembinaan Purcon v Entertainment Village (M) Sdn Bhd [2004] 1 MLJ 545 (refd)
Public Bank Berhad v CP Ng Holdings Sdn Bhd [1997] 2 CLJ Supp 459 (refd)
Quartz Hill Consolidated Gold Mining Co v Eyre (1883) 11 QBD 674 (refd)
Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd [1985] 1 MLJ 84 (refd)
Shamugam v Pappah [1994] 1 MLJ 144 (refd)
Shaw, Re, ex p Gill (1901) 83 LT 754 (refd)
Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509 (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313 (refd)
Stonegate Securities Ltd v Gregory [1980] 1 All ER 241 (refd)
Sun Life Assurance Company Of Canada v Jervis [1944] AC 111 (refd)
Tang Choon Keng Realty (Pte) Ltd & Ors v Tang Wee Cheng [1992] 2 SLR 1114 (refd)

Legislation referred to

Companies Act 1965 s 218
Debtors Act 1957
Rules of the High Court 1980 O 2 r 3, O 14

Paul Subramaniam, Ranita Markandan, Ding See Hock (Zaid Ibrahim & Co) for the plaintiff.
Lye Wing Voi (Vincent Lim & Partners) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] By way of an originating summons in encl one (1), the plaintiff sought for the following prayers:

(a) an injunction to restrain the defendant, its servants, agents or otherwise howsoever from presenting a petition to this honourable court or any other court for the winding up of the plaintiff pursuant to a statutory notice of demand dated 24 December 2003 for the payment of a sum of RM6,229,609.12 issued by the defendant under s 218 of the Companies Act 1965 until the final determination of Shah Alam High Court Suit No 22–491 of 2003;

(b) an injunction to restrain the defendant, its servants, agents or otherwise howsoever from taking or initiating further proceedings or actions on any petition for the winding up of the plaintiff which may have been presented to this Honourable Court or any other court;

(c) damages to be assessed;

(d) interest; and

(e) costs.

[2] Having heard the parties, I granted an order in terms of encl one (1). Once the winding up petition is presented, the plaintiff will be wound up and its business will cease. It was for these reasons that the plaintiff filed the originating summons in encl one (1). No company in the world would want to be wound up.

PRELIMINARY ISSUES

[3] The defendant raised three preliminary issues and they may be stated in this way:

(1) that the plaintiff's originating summons in encl one (1) was not necessary since it was an abuse of the process of the court and was now academic in nature;

(2) that the plaintiff's originating summons in encl one (1) was misconceived and ought to be struck out in limine; and

(3) that the plaintiff failed to disclose material facts that would adversely affect and negative the application for injunctive reliefs.

[4] I shall now consider these three preliminary issues in quick succession.

The first issue

[5] In my judgment, the application for injunctive reliefs against the defendant was not academic. It was and is a live issue. It deserved adjudication by this court. The plaintiff's cause of action was grounded on a tort and the defendant committed that tort the moment the s 218 notice under the Companies Act 1965 was served on the plaintiff. Hereinafter, I shall refer the plaintiff as 'MDC' and the defendant as 'Purcon'. Now, the application by MDC for an injunction to restrain the presentation of the petition was the preliminary step towards a claim in tort and in the event MDC was successful in its application for an injunction, MDC was at liberty to commence a separate suit for malicious prosecution or for an abuse of process (see the Federal Court decision in the case of *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509 which cited with approval *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674; and *OIW Retailers Ltd v Felview Pty Ltd* (1989) 7 ACLC 519). Given that the notice issued by Purcon under s 218 of the Companies Act 1965 was a pre-requisite to the commencement of the winding up proceeding, an immediate right accrued to MDC to take the necessary step to restrain the presentation of any intended winding up petition without the need to wait for the actual presentation of the petition by Purcon. The proposal by Purcon to withhold execution proceeding including the winding up proceeding and likewise the proposal from MDC to withdraw the suit did not neutralise the fact that a 218 notice to present a winding up petition had been served on MDC by Purcon and the threat of an impending proceeding under the Companies Act 1965 had become the main factor in the current originating summons in encl one (1).

[6] One may ask, what is a cause of action? It has been answered by Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against

another person.' Syed Agil Barakbah SCJ in *Hock Hua Bank v Leong Yew Chin* [1987] 1 MLJ 230, at p 236 defined it as 'a factual situation the existence of which entitles a plaintiff to obtain from the court a remedy against the defendant.' The cause of action in the present case was tortious in nature and based on the abuse of process. It must be borne in mind that at the time of the service of the s 218 notice and the inception of this suit by MDC the stay order had yet to be granted by the Shah Alam High Court. The threat of the impending winding up petition pursuant to the s 218 notice was and is still a real threat. MDC was entitled to seek relief by filing the originating summons in encl one (1) because the cause of action had accrued at that point of time. I must reiterate that the s 218 notice constitutes a sufficient threat that MDC's right or interest may be challenged and put in jeorpardy after the expiry of the twenty-one days period. At this juncture, a passage appearing in the book entitled, *Ford's Principles of Corporation Law* (6th Ed) written by HAJ Ford and RP Austin deserved reproduction. There at p 818, the learned authors wrote in a language that deserved compliment:

> An application for winding up even if subsequently dismissed as being ill-founded, can damage a solvent company's reputation. For that reason a company may be liable to persuade the court at an early stage, before the filing of an application or before the advertising of an application, to issue, in exercise of its inherent jurisdiction to restrain filing or advertisement or both as an abuse of the court's process.

[7] It was wrong for Purcon to say that the suit was academic by arguing that the stay order granted by the Shah Alam High Court was misconceived in law and in fact. Purcon relied on the case of *Sun Life Assurance Company Of Canada v Jervis* [1944] AC 111, HL, but that case was decided on its peculiar facts and the facts may be stated as follows. There an action was brought by the respondent to settle his rights under an endowment policy of life assurance issued to him by the appellants in December 1929. Before he effected the insurance the respondent received from the appellants a document which purported to describe the benefits which he would receive, but which, he contended, held out as results to flow from the insurance benefits greater than the policy itself provided. The respondent's action was for rectification of the policy to make its terms equivalent to the document mentioned, and the Court of Appeal (Scott and Goddard LJJ, Luxmoore LJ dissenting), affirming the decision of Atkinson J., upheld the respondent's contention and decided that the policy should be rectified and that an additional sum was due to him. The appellants applied to the Court of Appeal for leave to appeal to the House of Lords and the Court of Appeal granted leave on terms which were as follows: 'On the defendants undertaking to pay the costs as between solicitor and client in the House of Lords in any event and not to ask for the return of any money ordered to be paid by this order.' Viscount Simon LC writing the judgment of the House of Lords, with a coram of Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Porter and Viscount Simon LC, intimated that since, under the terms of the leave to appeal given to the appellants, they had no monetary interest in the result of the appeal, the House wished to hear argument on the question whether the appeal was competent. Having heard the arguments, this was what Viscount Simon LC said at p 113 of the report.

> My Lords, in my opinion, the House should decline to hear this appeal on the ground that there is no issue before us to be decided between the parties. The difficulty is that the terms put on the appellants by the Court of Appeal are such as to make it a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties.

[8] I must categorically say that the case of *Sun Life Assurance Company of Canada v Jervis* has no bearing to the present case. The allegation that MDC was abusing the due process of law by seeking a wide 'blanket security' via injunctive reliefs was made without any legal justification at all. A quick perusal of the originating summons in encl one (1) would show that the scope of the injunctive reliefs sought was to prevent presentation of a winding up petition for only a limited period or until the happening of an event, namely, until the final determination of the Shah Alam High Court suit. The originating summons in encl one (1) did not seek to restrain Purcon from exercising any other relief or mode of execution available to them. Indeed there was no abuse of process at all.

The second issue

[9] It hinged on the argument advanced by Purcon that the originating summons in encl one (1) was defective since MDC's name as stated in the intitulement was not an entity. MDC maintained and I agreed with the arguments that the error in the intitulement was unlikely to mislead or cause any prejudice or embarrassment to Purcon. In my judgment, Purcon had taken the necessary steps to contest the suit by filing its affidavits in opposition and, consequently, Purcon must be taken to have waived their objections to the intitulement. It was also part and parcel of my judgment that Purcon had taken a step in the proceedings and it must be deemed to have waived the preliminary objections on procedural non-compliance. Furthermore whatever non-compliance complained of by Purcon, it amounted, at best, to a breach of a procedural requirement. It was not of such a gravity as to warrant a sanction by this court by denying MDC the reliefs which it sought. There was, in my judgment, no injustice occasioned to Purcon by reason of the procedural breach. The same approach was adopted by the Court of Appeal in the case of *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321. There Gopal Sri Ram JCA writing for the Court of Appeal had this to say (see pp 328–329):

> Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasised that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. So, when a party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question

that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint.

In *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329, this court held as follows:

> The modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one of greater flexibility than that adopted heretofore. It is exemplified by the following passage in the judgment of Lord Woolf MR in *R v Immigration Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231. It is a case of the first importance. This is what the Master of the Rolls there said (at p 236):
>
> > An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see *Wade and Forsyth Administrative Law* (7th Ed 1994) p 255; *Supperstone and Goudie Judicial Review* (2nd Ed 1997) Ch 4 and *de Smith, Woolf and Jowell: Judicial Review of Administrative Action* (5th Ed 1995) pp 265–271). Frequently the investigation involves doing no more than deciding the sense in which the word 'shall' has been used as part of a particular procedural requirement. As the word 'shall' is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement.
>
> After referring to the speech of Lord Hailsham of St Marylebone LC in *London and Clydesdale Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, and quoting a passage therefrom, the Master of the Rolls continued as follows:
>
> > Bearing in mind Lord Hailsham LC's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory one, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

> This, I think, is the approach that should be adopted by our courts. In my judgment, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

[10] In *Shamugam v Pappah* [1994] 1 MLJ 144, at p 149, Edgar Joseph Jr SCJ aptly said in the context of a procedural irregularity:

> " In any event, it is far too late in the day for the defendant to take any objection as to procedure relating to the form of commencement of proceedings; she had entered an unconditional appearance, filed a defence, both sides had adduced evidence in support of their respective cases and final submissions in writing have been put in. In my view, therefore, the failure to comply with the requirements of any rules in beginning proceedings (if any) must be deemed to have been waived, and such failure (if any) should be treated as a mere irregularity not nullifying the proceedings. (See O 2 r 1(1) of the Rules of High Court 1980 ('the RHC')).

[11] With the passage of time, the new O 2 r 3 of the Rules of the High Court 1980 ('the RHC') was introduced. It states as follows:

> 3 Preliminary objection for non-compliance of rules not allowed (O 2 r 3)
>
> A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[12] That would put to nought the preliminary objection of Purcon under the second issue.

[13] Now, in regard to the argument by Purcon that this suit by MDC was a duplication of the Shah Alam High Court Suit No 22–491 of 2003, I have this to say. That the cause of action as reflected in the originating summons in encl one (1) was grounded on the tort of an abuse of process. The objective and legal basis of the present suit before me was certainly different from that of the Shah Alam High Court Suit No 22–491 of 2003 although the two suits shared the same underlying facts. The Shah Alam High Court Suit No 22–491 of 2003 was but a genesis to this current suit before me and the substratum of this current suit was based on an event subsequent to the proceedings in the Shah Alam High Court. Consequently, there was no duplication as alleged by Purcon. In the two cases, the causes of action were different in nature and they sought for different remedies entirely.

The third issue

[14] It centred on the purported failure of MDC to explain as to why it did not respond to Purcon's letter offering withholding of execution proceedings including winding up petition until 15 January 2004 as well as MDC's failure to reply to Purcon's letter dated 5 February 2004. But a perusal of MDC's affidavit in reply in encl 7 in particular the letter from Messrs Zaid Ibrahim & Co dated 23 January 2004

clearly showed that MDC through its lawyer had proposed a term for withdrawal of the injunction application. Purcon replied to this letter via its solicitors Messrs Vincent Lim & Partners letter dated 5 February 004. The contents of both these two letters were self-evident. It showed that the parties had failed to reach a consensus on the extra term for 'settlement'. This meant that the allegation of the purported failure by MDC to disclose the relevant facts was entirely unfounded.

[15] Be that as it may, the essential criteria for granting the injunctive reliefs in the originating summons in encl one (1) did not hinge on the failure of MDC to respond to the letter emanating from Messrs Vincent Lim & Partners. I would, in the course of this judgment, set out the principles governing the application for an injunction in order to restrain the presentation of a winding up petition.

FACTUAL BACKGROUND

[16] The plaintiff — MDC, is a private limited company incorporated in Malaysia under the Companies Act 1965. It is wholly owned and funded by the Government of Malaysia. MDC carries on the business of spearheading the development and implementation of the Multimedia Super Corridor ('MSC') in Malaysia. MDC is a 100% shareholder of Meitech Development Sdn Bhd (Company No 442977-k)('Meitech'). Meitech is a 70% shareholder of MSC E Resource Development Sdn Bhd (Company No 463386k) ('MSCERD'). MSCERD was formerly known as MSC Land Sdn Bhd. On 20 April 2000, MSCERD entered into a development agreement with Entertainment Village (M) Sdn Bhd (Company No 332264-T) ('EVSB') in order to develop the land as described in the development agreement into an Entertainment Village ('the E-Village Project').

[17] The defendant — Purcon, is a private limited company incorporated in Malaysia under the Companies Act 1965. Purcon carries on the business of developing land, construction and re-construction of all types of buildings and general contracting work.

The Shah Alam High Court Civil Suit No 22–491 of 2003

[18] I have to say something about the Shah Alam case. In that case, the defendant — Purcon, initiated an action against the plaintiff — MDC, demanding the payment of a sum of RM5,721,387.97 (excluding costs and interests) for work allegedly done by Purcon in respect of work allegedly awarded to Purcon by EVSB. Purcon claimed that MDC guaranteed to pay to Purcon the amount owing by EVSB to Purcon.

[19] I must be forgiven for setting out the chronology of events pertaining to the Shah Alam case which are relevant to the occasion at hand. They are as follows:

(a) on 18 August 2003, Purcon filed an application under O 14 of the RHC against MDC in order to obtain summary judgment against MDC;

(b) on 14 November 2003, the learned senior assistant registrar ordered summary judgment to be entered in favour of Purcon;

(c) on 18 November 2003, MDC filed a notice of appeal against the summary judgment decision; and

(d) on 24 November 2003, MDC filed an application for a stay of execution of the summary judgment together with a certificate of urgency and the stay application was fixed on 15 January 2004 and MDC had successfully obtained a stay of execution.

[20] On 24 December 2003, Purcon issued a statutory notice pursuant to s 218 of the Companies Act 1965 to MDC in order to demand the payment of a sum of RM6,229,609.12 that was said to be owing by MDC to Purcon under the summary judgment. MDC disputed the debt on substantial grounds.

ABUSE OF PROCESS

[21] It was the contention of MDC that it was an abuse of the process of the court if Purcon was allowed to present a winding up petition against MDC.

[22] It is trite law that a winding up petition should not be used as a means to enforce payment of a debt which is bona fide disputed on some substantial grounds (*Re King's Cross Industrial Dwellings Co* (1870) 11 Eq 149). The speech of Jessel MR in *Re Great Britian Mutual Life Assurance Society* (1880) 16 Ch D 246 merits reproduction and there his Lordship aptly said at p 253 of the report:

> ... in my opinion it is not sufficient for the respondents, upon a petition of this kind, to say 'we dispute the claim'. They must bring forward a prima facie case which satisfies the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding.

[23] In my considered view, it is certainly an abuse of the process of the court to petition MDC upon the basis of a debt which was bona fide disputed. Purcon was exerting undue pressure on MDC. The s 218 notice was based upon a judgment debt obtained by Purcon in a related Shah Alam High Court suit where Purcon was the plaintiff. The judgment was for an unsecured debt and MDC had filed an appeal to the Judge in chambers and the appeal was still pending. Meantime MDC had applied and obtained a stay of execution of the said judgment in the Shah Alam High Court. Now, the events leading up to the service of the s 218 notice clearly showed that Purcon was only interested to ulitise the proceedings of the Companies Court to exert undue pressure. This was quite evident as there was never any attempt by Purcon to request for the payment of the judgment sum. After the judgment was sealed by the Shah Alam High Court and the service of a copy of the judgment was effected via a letter from Messrs Vincent Lim & Partners dated 24 December 2003, the next thing that followed was the s 218 notice via the same solicitors' letter dated 24 December 2003 addressed to MSC Management Services Sdn Bhd — a fully owned affiliate of MDC.

[24] Purcon was evidently anxious to execute the judgment by using the most drastic measure of winding up. There was never any other demand made even though other execution proceedings were available to Purcon like for instance commencing

a writ of seizure and sale, taking up a garnishee proceeding or even proceeding under the Debtors Act 1957. It was beyond dispute that the judgment relied upon by Purcon was that of an ordinary unsecured debt. It would be factually impossible to convince any tribunal that Purcon's intended winding up petition could be for the common good of all creditors of the company. It must be borne in mind that MDC is a special purpose vehicle set up by the Government of Malaysia for a national project. The amount of interest and stake that the Government had in MDC is indeed colossal. It was absurd for Purcon to suggest that the winding up of MDC would be in the interest of the majority shareholders in MDC — meaning the Government of Malaysia. Taken in its correct perspective, it was right on the part of MDC to maintain that there was indeed an alternative suitable remedy available to Purcon and that the presentation of the winding up could cause irreparable damage to MDC and its shareholders. In *Charles Forte Investments Ltd v Amanda* [1964] 1 Ch 240, CA, Willmer LJ writing a separate judgment had this to say at pp 251–252 of the report:

> Malins V-C, a few days later, granted a similar injunction in the case of *Cadiz Waterworks Company v Barnett* (1874) LR 19 Eq 182 on the ground that it is the object of the court to restrain the assertion of doubtful rights in a manner productive of irreparable damage.
>
> I accept, of course, as has been pointed out, that these cases, being cases of creditors' petitions, are not the same as the present case; but those words of Malins V-C, as it seems to me, are words of general application and seem to me to be apt to the present case. For in the present case, as I think, there is good reason to think that the presentation of a winding up petition, with the consequent necessity for advertisement, might cause irreparable damage. There can, I think, be no doubt that the allegations in the proposed petition amount to a very grave attack upon the directors of the plaintiff company, who are the same people as the directors of Forte's (Holdings) Ltd. The publicising of this attack could, therefore, have a damaging effect on Forte's (Holdings) Ltd., with the possibility of damage (possibly irreparable) to quite innocent shareholders in the company.

[25] Continuing at pp 257–258 of the report, Willmer LJ had this to say:

> In my judgment, the decision of Simonds J in the*Cuthbert Cooper case* [1937] Ch 392 was a sound decision, one that should be followed, and one which, as I think, governs this case to the extent of saying that here, as there, the winding up petition is misconceived even if the allegations contained in it could be substantiated, having regard to the existence of an alternative and more suitable remedy. It is to be observed that by bringing an action the defendant, if he has a good case, could not only more easily obtain what he is really after, but he could do so without incurring the risk of inflicting damage, possibly irreparable damage, on the company, and possibly also on other innocent shareholders.
>
> In those circumstances, it seems to me that that is an additional reason for holding that the injunction which is sought ought to be granted.

[26] Put in another way, I must say that a court of law may grant an injunction to restrain the presentation of a winding up petition where such a presentation, even though it can be substantiated on valid grounds, could cause irreparable damage to the company and also on other innocent shareholders having regard to the existence of the alternative and more suitable remedy. The case of *Charles Forte Investments Ltd v Amanda* is not the only case that sets out this salient principle of law. There is

another case by the name of *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* [1976] 2 ACLR 349, a decision of McGarvie J, that is worth referring to. There at p 353 of the report, McGarvie J, had this to say:

> When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. *Mann v Goldstein* [1968] 2 All ER 769; [1968] 1 WLR 1091 at p 1093–4. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process. The law has long recognised that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognised that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless the company meets his claim. While that threat exists, the company, in order to avoid the dam age involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so.

[27] Continuing at pe 359 of the report, McGarvie J, aptly said:

> The authorities which have been discussed illustrate the distinction between the application of the first and second branches of the principle.
>
> The first branch applies to cases where the petitioner is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can found a winding up order, the petition is incapable of success as a matter of law. If there is no sufficient evidence to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed.
>
> The second branch applies to cases where there is more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time.

[28] Proceeding further at p 368 of the report, McGarvie J, said:

> However, the authorities which have been considered, show that, in the exercise of discretion on a winding up petition, the courts have treated the case of a clearly existing debt which is subject to a genuine cross-claim based on substantial grounds, in a way which is analogous to their treatment of a disputed debt. Although the debt itself is not doubtful, it is doubtful whether, when the claims between them are settled, the petitioner will be

entitled to receive payment from the company of the amount of the debt. It would normally involve some incongruity to liquidate a company at the instance of a petitioner who may, when all outstanding claims are settled, be entitled to receive nothing from the company or be required to make a payment. In the light of the broad and practical approach which the courts have taken in the great variety of situations in which a company has been treated as having a cross-claim against a petitioner, I consider that the plaintiffs should here be regarded as having cross-claims against the Deputy Commissioner.

[29] Finally, at p 369 of the report, McGarvie J, had this to say:

I do not accept the submission that before granting an injunction I would need to be satisfied that the Deputy Commissioner had no chance of success in obtaining a winding up order. The present case is to be determined upon the second branch of the general principle, where the presentation of a petition may be restrained despite the fact that there is a chance that a winding up order may be made. This chance may exist in at least two ways. First, the test that it is unlikely that a winding up order would be made by any judge in the exercise of his discretion, does not exclude all possibility of such an order being made. Second, if the test is stated in different words, the position is that an injunction may be granted where it is likely that if a petition were presented, any judge would either dismiss it or stand it over. The purpose of standing over a petition is to enable the disputed claim to be determined in other proceedings. If the other proceedings result in favour of the petitioning creditor, the court may then make a winding up order.

[30] It was argued that Purcon was entitled to commence winding up petition based on the judgment obtained in the Shah Alam High Court despite the fact that there was an appeal pending against the judgment. But the totality of the evidence as presented in this suit overwhelmingly showed that the predominant purpose of Purcon's intended winding up proceeding was none other than to force payment of its money judgment debt from MDC and not for the benefit of the general body of creditors of MDC as claimed (*In re International Tin Council* [1988] 3 WLR 1159, CA). On the strength of its inherent jurisdiction, this court certainly has the power to grant an injunction to restrain Purcon from filing a winding up petition against MDC (*Tang Choon Keng Realty (Pte) Ltd & Ors v Tang Wee Cheng* [1992] 2 SLR 1114). At this juncture, it is ideal to refer to the case of *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors* [1986] 1 CLJ 493. There VC George J, said at pp 496–497 of the report:

In the face of what appears to be complete answers to the various complaints of the petitioners given by the fourth respondent on behalf of all the respondents in his affidavit filed herein and the contentions wherein not having been challenged and in the light of the fact that the respondents' offer to buy up the petitioners' shares in the terms that the petitioners have sought the order of the court being turned down and in the absence of any explanation for doing so and in the face of their conduct in filing the Civil Suit No C4306 of 1984 and obtaining an *ex parte* interim injunction and then apparently on being challenged having it withdrawn and agreeing to pay damages for having had the injunction imposed and consenting to have the suit itself discontinued which was done in February 1985 following upon which in April 1985 having the present petition presented on the same or almost the same complaints set out in the discontinued action and eventually having advertised it withdrawing it upon the presentation of it being challenged followed by the presentation of yet another petition soon after, I am constrained to conclude that the petition is not a bona fide attempt to obtain the relief asked for in the petition but that its

real objective was to achieve a collateral purpose which appears to be to cause embarrassment to some or all of the defendants. In *Re Bellador Silk Ltd* [1965] 1 All ER 667 at p 672A–B, Plowman J said in respect of a petition to wind up a company:

> ... A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the Court, and it is primarily on that ground that I would dismiss this petition.'

The principle was explained thus by Lord Denning in *Goldsmith v Sperrings Ltd* [1972] 2 All ER 566 at p 574:

> In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The Judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.
>
> Sometimes abuse can be shown by the very steps being taken in the Courts, …. Again, where a pamphlet contained two different passages, each defamatory of a man, and he brought two separate actions, one for each passage. He failed on the first. The second was stayed. Fry LJ saying:... such successive actions …… would be an abuse of the process of the Court...: see *MacDougall v Knight*...

The same principle is shown in many bankruptcy cases. It was well stated by Evershed MR delivering the judgment of this Court in *Re Majory:*

> … The so-called 'rule' in bankruptcy is, in truth, no more than an application of a more general rule that Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the Court, and, therefore, disqualified from invoking the powers of the Court by proceedings he has abused.'

The same principle has been applied also in winding up cases: see in *Re Bellador Silk Ltd.*

In all circumstances I am satisfied that the justice of the matter calls for a review of the order made herein on 9 September 1985. And in doing so I have, as has been seen, come to the conclusion that the presentation of the petition is an abuse of the process of court. Where there is an abuse of the process of the court, the judges can and will intervene to stop it as I do in this case.

[31] It must be emphasised that the court should dismiss a bankruptcy petition where its presentation is an abuse of the process of the court (*Re Majory, A Debtor, ex p Debtor v FA Dumont Ltd* [1955] Ch 600, sub nom *Re A Debtor (No 757 of 1954), ex p Debtor v FA Dumont Ltd (Petitioning Creditor)* [1955] 2 All ER 65, CA; *Re Shaw, ex p Gill* (1901) 83 LT 754, CA; *Re A Debtor (No 20 of 1904), ex p Debtor* (1904) 91 LT 664 (affidavit sub nom *Re Goldberg* [1904] 21 LTR 139, CA); *Re G, ex p B* (1900) 44 Sol Jo 345, CA, *Re Brindley, ex p Taylor, Sons & Co* [1906] 1 KB

377, CA.; and *Re A Debtor (No 883 of 1927)* (1928) Ch 199, CA). And where the debt is genuinely disputed by the debtor, it is said that the court may find that the presentation of the petition is an abuse of process (*Re A Judgment Summons (No 25 of 1952), ex p Henlys Ltd* [1953] Ch 1 at p 5,; [1952] 2 All ER 772 at p 774; and on appeal, it is reported vide [1953] Ch 195 at pp 201–207, [1953] 1 All ER 424 at pp 426–430, CA per Jenkins LJ). Ungoed-Thomas J stated the principle in this way in the case of *Mann v Goldstein* [1968] 1 WLR 1091, at pp 1098–1099:

> For my part I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor, he is not entitled to present the petition and has no *locus standi* in the Companies Court; and that, therefore, to invoke the winding up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court.

[32] It is germane to mention that this very passage received the approval of Buckley LJ when his Lordship cited it in his judgment in the case of *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241.

[33] In *Re Lympne Investments Ltd* [1972] 2 All ER 385, Megarry J, made the following comment in a winding up petition — germane to the occasion at hand (see p 389):

> The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out.

LACK OF BONA FIDE ON PURCON'S PART

[34] On 5 January 2004, approximately 10 days after the service of the s 218 notice, I delivered a judgment in the case of *Pembinaan Purcon v Entertainment Village (M) Sdn Bhd* [2004] 1 MLJ 545 wherein a similar attempt was made by Purcon to wind up Entertainment Village (M) Sdn Bhd (referred to earlier as EVSB) on the same debt arising from the same transaction and I had dismissed Purcon's application on the basis that the debt was disputed on substantial grounds.

[35] Now, at the very least and on a prima-facie footing it would be safe to assume that following the dismissal of Purcon's application to wind up EVSB, Purcon now started negotiation with MDC by offering to withhold all execution proceedings including the winding up proceeding until 15 January 2004. It would be interesting to note that in the earlier part of the correspondences between Messrs Vincent Lim & Partners and Messrs Zaid Ibrahim & Co prior to 5 January 2004, Messrs Vincent Lim & Partners acting on Purcon's behalf had adopted an aggressive approach in threatening to take winding up proceeding against MDC. But, in the final letter from

Messrs Vincent Lim & Partners dated 5 February 2004 Purcon took an unexpected turn from their initial approach largely, I believe, due to my decision in the case of *Pembinaan Purcon v Entertainment Village (M) Sdn Bhd*.

[36] Another factor worth considering would be this. That in the case of *Pembinaan Purcon v Entertainment Village (M) Sdn Bhd* as well as in the case of the Shah Alam High Court suit, Purcon's stand was that EVSB was primarily liable for the debt whilst MDC was secondarily liable as a guarantor pursuant to certain undertakings given by MDC to Purcon assuring Purcon of the repayment of the same debt due from EVSB to Purcon. But MDC had disputed this in the Shah Alam High Court suit. Since the debt allegedly owed by EVSB to Purcon was adjudged by me as substantially disputed, it would now be absurd to say that MDC, as the guarantor (which was denied), would be liable for the same principal debt that was adjudged to be disputed on substantial grounds. It was part and parcel of MDC's submissisons that since the third party (EVSB) had been adjudged in the case of Pembinaan *Purcon v Entertainment Village (M) Sdn Bhd* to be not in default because the alleged debt owed to Purcon was disputed on substantial grounds, MDC cannot be said to be responsible under the guarantee or undertaking to discharge the liability of EVSB because EVSB was not in default of the debt. That was certainly food for thought.

The debt on the summary judgment was bona fide disputed as it was subject to an appeal

[37] It must be emphasised that Purcon moved expeditiously to execute the summary judgment by taking the following steps

(a) Purcon's solicitors forwarded the draft order and the draft judgement of MDC's solicitors for the approval of the MDC's solicitors on the same day that the summary judgment was entered and that would be on 14 November 2003.

(b) That on 24 December 2003, Purcon's solicitors forwarded to MDC's solicitors a copy of the sealed judgment.

(c) That on the same day that a copy of the sealed judgment was forwarded to MDC's solicitors and that would be on 24.12.2003, Purcon proceeded to issue the s 218 notice to MDC.

[38] The foregoing sequence of events showed that the s 218 notice was issued by Purcon as a means to execute the summary judgment. It was the contention of Purcon that there was a debt due and payable by MDC to Purcon because of the summary judgment. But Purcon cannot solely rely on the fact that it had obtained a summary judgment to prove that there was a debt due and payable for the purpose of s 218 of the Companies Act 1965. There was an appeal pending and the debt was bona fide disputed and, flowing from all these, it can be said that the intended winding up petition by Purcon was an abuse of the process of the court.

That MDC has rebutted the presumption in s 218(2)(a) of the Companies Act 1965 that it was unable to pay its debt

[39] Briefly, s 218(2)(a) of the Companies Act 1965 provides that if the statutory notice has been served and the plaintiff (MDC) neglects to pay the debt within

21 days, then a presumption arises that the plaintiff (MDC) is insolvent and is unable to pay its debt. It is a deeming provision and it is open to MDC to rebut the presumption that it is unable to pay its debt (*Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313, SC; *Public Bank Berhad v CP Ng Holdings Sdn Bhd* [1997] 2 CLJ Supp 459; and *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84). In my judgment, MDC has shown that it is a solvent company and thus MDC has rebutted the presumption for the following reasons:

(a) The audited accounts of MDC for the year ended 31 December 2002 demonstrated that MDC has an excess of total assets over total liabilities of RM15,522,322.

(b) That the Government of Malaysia has injected further capital into MDC. On 13 December 2004, the issued and paid up share capital of MDC had been increased by 80,600,000 amounting to 311,980,003 issued and paid up shares of RM1.00 each.

(c) That the Government of Malaysia is committed to the success of MDC and will inject further funds into MDC if the need arises. There is certainty that MDC will be able and is willing to satisfy any judgment ordered against MDC, upon final appeal.

All these averments can be seen in para 9(d) of MDC's affidavit in support including MDC's affidavits in respect of the stay application. See also exh 'JSD-9a' of MDC's affidavit in support.

Whether the principle in American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504 *is applicable to an application for an injunction to restrain the presentation of a winding up petition?*

[40] The answer to this question would be in the negative. Low Hop Bing J, in *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311, at p 321 aptly said:

> Prima facie case
>
> In *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words:
>
> I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a prima facie case and that the principle relating to the test of 'serious question to be tried' in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.
>
> Illustrations of a prima facie case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent.

[41] This would be followed by the case of *Bryanston Finance Ltd v De Vries (No 2), Same v Same* (1976) 1 Ch 63, a decision of the English Court of Appeal with a coram of Buckley and Stephenson LJJ and Sir John Pennycuick. At p 79 of the report, Stephenson LJ observed that:

> It is the practice for a company which objects to a shareholder's improperly presenting a petition to wind it up to move for an injunction to restrain him: the court's jurisdiction to do so is a facet of its inherent jurisdiction to prevent an abuse of its process: *Charles Forte Investments Ltd v Amanda* [1964] Ch 240 and *Mann v Goldstein* [1968] 1 WLR 1091, pp 1093–1094. But the method of applying does not transform the substance of the proceeding or the nature of what the applicant has to prove. If he applied to strike out the petition under the inherent jurisdiction or under RSC, O 18 r 9(1)(d) and (3), he would not be able to rely on anything said by the House of Lords in the *American Cyanamid case* [1975] AC 396 or on the balance of convenience. Nor can he do so because considerations of the irretrievable damage to a company from advertising a baseless petition have led to the practice of applying for an injunction to restrain a would-be petitioner from presenting it.
>
> Mr Bateson sought support for the judge's approach and order in the concluding sentence of the judgment of Sir George Jessel MR in *Niger Merchants Co v Capper* (1877) 18 ChD 557, p 559. He claimed support there for his submission that the injunction he prayed for was only interlocutory, that there was a serious issue to be tried after it had been granted or refused, and that at this stage the balance of convenience had therefore to be considered and the *American Cyanamid* case applied. But the hearing to which the sentence in the *Niger Merchants* case refers was clearly a hearing of conflicting evidence on the question whether Mr Capper did threaten the company with winding up, which he denied, and that case is no authority for the proposition that a plaintiff company, which moves for an injunction to restrain the presentation of a petition to wind it up as an abuse of the process of the court, can rely on a balance of convenience and reserve its evidence to prove the abuse until the question whether it is an abuse is finally decided at the trial of the action. I agree with Sir John Pennycuick, whose judgment I have had the privilege of reading, that it is finally decided at this stage and there is nothing left to try.

[42] Continuing at p 80 of the report, Stephenson LJ said:

> This is not —
>
> > an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right,...
>
> but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the *American Cyanamid* case which Buckley LJ quoted do not apply to such an application as this. Their Lordships do not seem to have had this sort of injunction in mind and they cannot have overruled*Forte's case* (1964) Ch 240 by implication. Forte's case still binds us to hold that unless the plaintiff company can prove that a petition is bound to fail — or perhaps that there is a suitable alternative remedy to a petition — the defendant cannot be restrained, even temporarily, from presenting it. The judge has found that it might succeed. Some of the defendant's allegations, if substantiated, could lead the Companies Court to the conclusion that it is just and equitable to wind up the plaintiff company. He did not, and could not, find that there was no evidence to substantiate them. He was prevented from giving the proper effect to that finding my mistakenly applying the *American Cyanamid* case. So he decided this case on the wrong basis. If he thought that investigation by the Department of Trade and Industry was a suitable alternative remedy I respectfully disagree.

[43] And writing a separate judgment, Sir John Pennycuick aptly said at p 80 of the report:

> I agree for the reasons given by Buckley LJ that the appeal in the first action should be dismissed and that the appeal in the second action should be allowed. I should only like to add certain observations on the decision of the House of Lords in the *American Cyanamid case* [1975] AC 396. It seems to me that that decision cannot be regarded as applicable to a motion for an injunction restraining the presentation of a threatened winding up petition on the ground that presentation of the petition would be an abuse of the process of the court.

[44] Continuing at p 81 of the report, Sir John Pennycuick said:

> The decision in the *American Cyanamid* case was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action: cf per Lord Diplock. He said, at p 405: 'The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.' And at p 406:
>
> > When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.
>
> I do not think that the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action and more particularly motions seeking to stop proceedings in limine. I appreciate the wide words used by Lord Diplock, at p 406:
>
> > In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions.
>
> But these words must be read in their context and I am sure Lord Diplock was not intending to say that the principles were applicable in a class of case not under consideration in which their application would be entirely inappropriate.

[45] With the assistance of these two salient authorities, the burden of proof casts on MDC can be discharged by reference to the standard of proof or test in adducing evidence to establish a prima facie case. As demonstrated earlier, MDC has succeeded in doing so.

THE PROPOSITIONS OF LAW

[46] This judgment brings forth the following propositions of law:

(1) That a civil action would lie for falsely and maliciously and without reasonable or probable cause by an act of presenting a petition to wind up a company which would be injurious to the credit of the company. This right exists despite the fact that no substantial or special damage is shown to have been suffered by the company. A trial ought to be held to determine whether the creditor

who presents the petition is activated by malice or whether there is a want of reasonable or probable cause for presenting the petition (*Quartz Hill Consolidated Gold Mining Co v Eyre*; and *Si & Si Sdn Bhd v Hazrabina Sdn Bhd*). A

(2) That a winding up proceeding is not a specie of execution proceeding. That the creditor who petitions the Companies Court is not exercising his right in personam to execute a judgment debt against the company as he would in an execution proceeding. The creditor merely exercises his right in rem to claim against the assets of the company along with the other creditors whom the company may be liable to upon being wound up. Put differently, the creditor merely seeks to recover for the benefit of all the creditors as well as for his own benefit (*In re International Tin Council*). B C

(3) That the court is empowered to grant an injunction to restrain the presentation of a winding up petition where such a presentation could cause irreparable damage to the company and other innocent shareholders bearing in mind that there exists an alternative and a more suitable remedy notwithstanding the fact that the creditor may have valid grounds (*Charles Forte Investments Ltd v Amanda*). D

(4) An injunction to restrain the presentation of a winding up petition is not the same as an application for an interlocutory injunction to restrain the defendant from doing acts alleged to be in violation of the plaintiff's legal right. It is, in fact, an injunction to restrain the defendant from exercising his legal right to present a petition. The dicta of Lord Diplock in the landmark case of *American Cyanamid Co v Ethicon Ltd* does not apply to such an application (*Bryanston Finance Ltd. v De Vries (No 2), Same v Same*; and *Molop Corp Sdn Bhd v Uniperkasa*). E F

(5) If the sole or predominant purpose of the intended winding up is for a collateral purpose of exerting under pressure for a mere collection of debt or simply to bring pressure to bear or to force the company to negotiate with the creditor, the creditor would be abusing the process of the court for which an injunction would lie to prevent the creditor from exercising such right (*Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors*). G

(6) The Companies Court must not be used as a debt collecting agency nor as a means to bring improper pressure to bear on a company. It would be wrong to allow such petitions to be used as a means of resolving disputes which ought to be settled in an ordinary litigation or to be kept in suspense over the company's head while the litigation is being fought out (*Re Lympne Investments Ltd*). H

(7) The courts are generally reluctant and wary in allowing winding up petitions. Litigants should resort to a lesser drastic alternative remedy despite the fact that I

the grounds to support the petitions may be substantiated (*Charles Forte Investments Ltd v Amanda*; and *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation*).

CONCLUSION

[47] For the reasons as adumbrated above, I gave an order in terms of encl one (1).

Plaintiff's application allowed.

Reported by Loo Lai Mee